

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in June 2008**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

**TOPICAL INDEX**  
**HIGHER EDUCATION EMPLOYEES**

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**KEYWORDS:** APOLOGY; RELIEF REQUESTED

**CASE STYLE:** LAWRENCE v. BLUEFIELD STATE COLLEGE  
DOCKET NO. 2008-0666-BSC (6/19/2008)

**PRIMARY ISSUES:** Whether Grievant has requested a remedy which is available.

**SUMMARY:** Grievant claimed his supervisor made hostile comments about him to potential students. This resulted in damage to Grievant's reputation. Grievant requested Respondent issue an apology. An apology is not a remedy available through the grievance process. Grievance DENIED.

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**KEYWORDS:** TIMELINESS

**CASE STYLE:** FROST v. BLUEFIELD STATE COLLEGE AND DIANA GIBSON, INTERVENOR  
DOCKET NO. 07-HE-349 (6/13/2008)

**PRIMARY ISSUES:** Whether Grievant timely filed at level one.

**SUMMARY:** In March of 2007, the Director of the Physical Plant at Bluefield State College retired. Instead of posting the position as a vacancy, the college continued to employ the retired employee as Acting Director of the Physical Plant. Grievant seeks the posting of the position of Director of the Physical Plant. Grievant became aware of this decision by the college on April 11, 2007. Grievant did not file this grievance until May 5, 2007. The statute in effect at the time of filing this grievance provided that the filing be done within ten days of the date on which the event became known to Grievant. Grievant did not offer any reason for the delay in filing. Therefore, this grievance must be denied for untimeliness. Grievance DENIED.

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<b><u>KEYWORDS:</u></b>	TIMELINESS; CONTINUING PRACTICE; HOLIDAY PAY; SUBSTITUTE TIME OFF
<b><u>CASE STYLE:</u></b>	<u>BLON/EXLINE v. WEST VIRGINIA UNIVERSITY</u> DOCKET NO. 07-HE-152 (6/16/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether application of holiday pay policy is a continuing practice, and whether policy has been properly applied.
<b><u>SUMMARY:</u></b>	<p>When Grievants work holidays they may elect to receive pay at time and a half for the actual hours worked, in addition to their regular rate of pay for that day, or they can take substitute time off for the hours worked, times 1½. Grievants contend that Respondent should pay them time and a half when they work holidays, and also give them substitute time off work for every holiday they work. It appears Grievants are also arguing that the calculation of substitute time off is in error, and that when they elect to receive substitute time off, they should get a day off comparable to the holiday, plus the hours they actually worked on the holiday, times 1½. Respondent raised a timeliness defense. This grievance falls within the continuing practice exception. As to the merits, the applicable policy clearly provides that, in addition to his regular pay for the holiday, an employee who works on a holiday may elect to receive either time off in place of the holiday, or additional pay for the holiday at time and a half. The employee does not get both substitute time off work and pay at time and a half. Further, it is clear that if the employee elects to take substitute time off, he is allowed no more than the actual hours worked times 1½. Grievance DENIED.</p>

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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<b><u>KEYWORDS:</u></b>	MOTION TO DISMISS, DECLARATORY OPINION, REMEDY, MOOTNESS
<b><u>CASE STYLE:</u></b>	<u>COOK v. LOGAN COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-23-160 (6/13/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether grievance should be litigated (dismissed) if there is no viable relief that can be awarded. (Motion to Dismiss)
<b><u>SUMMARY:</u></b>	<p>Grievant, employed as a first grade teacher during the 2006-2007 school year, was not selected for a kindergarten teaching position at the Elementary School in which she was employed. Grievant alleges that she was denied the position as a result of discriminatory actions by agents of the Respondent. While Grievant was pursuing her grievance, Respondent reduced the number of kindergarten rooms at Grievant's school from three to two (RIF not connected to instant matter), eliminating the teaching position sought by Grievant. The remaining two kindergarten teaching positions are occupied by individuals with more seniority than Grievant. Throughout the course of events Grievant retained her first grade teacher position and was duly compensated. There is no difference in salary for Grievant between the two positions.</p> <p>In 2008, Respondent filed a motion to dismiss the grievance. There is no economic loss, further the position in contention is no longer in existence. In that the Grievance Board is incapable of turning back time to the 2006 school year to allow Grievant to teach kindergarten rather than first grade, the motion, among other contentions, argues that there is no remedy that the Grievance Board can award Grievant.</p> <p>The Grievance Board does not issue advisory opinions. While the Grievant did in 2006 expressed a legitimate grievance, whose merits have not been litigated, there is no identifiable lawful relief that can be granted to Grievant in the circumstances of this case, by this Grievance Board. Motion to Dismiss GRANTED.</p>

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**KEYWORDS:**

SELECTION; ARBITRARY AND CAPRICIOUS; ABUSE OF DISCRETION

**CASE STYLE:**

WILMOTH v. RANDOLPH COUNTY BOARD OF EDUCATION AND DAVID FINCHAM, INTERVENOR

DOCKET NO. 07-42-344 (6/30/2008)

**PRIMARY ISSUES:**

Should Grievant have been selected for the position of principal of Elkins High School?

**SUMMARY:**

Grievant challenges the board of education's selection of Intervenor, rather than Grievant, for the position of principal of Elkins High School. Two principal positions were posted together, and a single interview committee assessed and interviewed the applicants. Intervenor was the top applicant for both positions. Grievant only applied for the Elkins High School position, and he was the second highest scorer. Steve Wamsley, who was ultimately hired for the other position at Tygarts Valley High School, applied only for that position, but had a lower overall score than Grievant's.

Grievant's allegations regarding events which occurred at the board meeting when the recommendations for the positions were considered were found not to be relevant to the selection of Intervenor, nor did they establish that the selection decision was arbitrary and capricious or an abuse of discretion. As the top-scoring applicant, with no challenge to his qualifications, the selection of Intervenor over Grievant was reasonable and not legally improper in any respect. Grievance DENIED.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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<b><u>KEYWORDS:</u></b>	DISMISSAL, IMMORALITY, MITIGATION
<b><u>CASE STYLE:</u></b>	<u>PAINTER v. KANAWHA COUNTY BOARD OF EDUCATION</u> DOCKET NO. 2008-0724-KANED (6/18/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether discharge is a proper disciplinary measure or clearly disproportionate to Grievant's offense.
<b><u>SUMMARY:</u></b>	<p>As a result of an investigation into an unlawful scheme where individuals falsified overtime or extra pay records in order to receive or authorize compensation for work which had not been performed (defrauding Respondent), it was determined that Grievant's admitted participation and failure to inform appropriate authority justified her termination. Grievant disagrees. Grievant made restitution and cooperated with Respondent's investigation. Grievant avers her participation was an isolated instance, the result of her supervisor's design, and contends discharge is too severe a punishment for her reluctant involvement. Respondent acknowledges Grievant's cooperation, a favorable employment record, and that Grievant's role in this scheme was not as egregious as that of some others, but maintains that her actions were improper and unlawful. Respondent chose to terminate Grievant.</p> <p>Considerable deference is afforded an employer's assessment of the seriousness of an employee's conduct. It has not been demonstrated that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it amounts to an abuse of discretion. Grievance DENIED</p>

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<b><u>KEYWORDS:</u></b>	RES JUDICATA; UNIFORMITY; LIKE ASSIGNMENTS AND DUTIES
<b><u>CASE STYLE:</u></b>	<u>KETZ v. RALEIGH COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-41-374 (6/25/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether the issues of this claim have already been fully litigated.
<b><u>SUMMARY:</u></b>	Grievant alleges numerous code violations relating to the change in the term of her contract, but had already raised the same claims in two prior grievances, and hence was barred from pursuing this claim by res judicata.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	DEFAULT; APPEAL PARAGRAPH; BAD FAITH; SUBSTANTIAL COMPLIANCE
<b><u>CASE STYLE:</u></b>	<u>WILLS v. DEPARTMENT OF ADMINISTRATION/OFFICE OF TECHNOLOGY</u> DOCKET NO. 2008-0768-DOADEF (6/6/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether failure to include in a Level One decision advice of the Grievant's right to appeal to Level Two renders the decision fatally flawed, so as to constitute a default, as if the decision had not been rendered at all?
<b><u>SUMMARY:</u></b>	Grievant filed a motion for judgment by default at Level One of the grievance procedure based on the failure of the Level One decision to advise him of his right to appeal it. The record contains no evidence that the Respondent omitted the appeal advisement in bad faith and suggests that the Grievant was not materially disadvantaged by the Respondent's error. Under these circumstances, the intent of the law that grievances be "[r]esolv[ed] . . . in a fair, efficient, cost-effective and consistent manner," W. Va. Code § 6C-2-1(b) (2007), requires denial of Grievant's default motion, and return of the grievance to the normal grievance process, where its merits can be considered and decided. DENIED.

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**KEYWORDS:** DISCIPLINARY DEMOTION; MISCONDUCT; PROGRESSIVE DISCIPLINE; HOSTILE WORK ENVIRONMENT; HARASSMENT; RELIEF; UNSATISFACTORY PERFORMANCE

**CASE STYLE:** BOSTIC v. INSURANCE COMMISSION  
DOCKET NO. 07-INS-091 (6/3/2008)

**PRIMARY ISSUES:** Whether Respondent met its burden of proof and established Grievant's disciplinary demotion was warranted for unsatisfactory job performance and for harassment and creating a hostile work environment. Whether mitigation of the discipline is warranted.

**SUMMARY:** Grievant was demoted for failure to satisfactorily perform her duties and for creating a hostile work environment and harassing her supervisees. Prior to the demotion, Grievant never received any progressive discipline, and her evaluations were satisfactory. The evidence demonstrated Grievant was never given the assistance she needed to perform her duties, and her supervisors did not respond to her requests for help. While some of Grievant's behavior needed correction, no Corrective Plan was utilized. Grievance GRANTED and relief fashioned per Grievant's request.



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**KEYWORDS:** MINIMUM QUALIFICATIONS; ARBITRARY AND CAPRICIOUS;  
CLEARLY WRONG

**CASE STYLE:** FARLEY v. DEPARTMENT OF HEALTH AND HUMAN  
RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND  
DIVISION OF PERSONNEL

DOCKET NO. 07-HHR-161 (6/10/2008)

**PRIMARY ISSUES:** Whether the Division of Personnel acted in an arbitrary and capricious manner when determining that Grievant lacked the necessary qualifications for a position.

**SUMMARY:** Grievant is employed by the Department of Health and Human Resources ("DHHR"), currently working for the Division of Training as a Health and Human Resource Specialist, Senior. In December of 2006 a Community Service Manager 2 position was posted for Logan County. Grievant submitted an application for the position. Grievant interviewed for the position on January 26, 2007. At some point after the interview, the Regional Director for DHHR informed Grievant he would be recommending her for the position. DHHR submitted Grievant's documents to the Division of Personnel ("DOP") for review and consideration. DOP contacted DHHR to inform them that there was a problem with Grievant's qualifications for the Customer Service Manager 2 position. Due to Grievant possessing a Regents Bachelor of Arts degree, DOP did not use work experience prior to obtaining the degree due to the outstanding question of how much work experience was used toward that degree. This question concerning Grievant's past work experience caused DOP to be uncertain as to Grievant's qualifications. The need for DOP clarification from the institution awarding this degree was communicated to Grievant. Nevertheless, DOP did not receive any additional information from Grievant in regard to her Regents degree, and the work experience utilized by the institution to grant the degree. Based upon all the information presented to the DOP, Grievant did not possess the minimum qualifications for the position. This determination by DOP was reasonable based upon the available information, and was not arbitrary and capricious. Grievance DENIED.

<b><u>KEYWORDS:</u></b>	MISCLASSIFICATION; REALLOCATION
<b><u>CASE STYLE:</u></b>	<u>BENNETT v. INSURANCE COMMISSION AND DIVISION OF PERSONNEL</u> DOCKET NO. 07-INS-299 (6/27/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant was properly classified as an Office Assistant II rather than an Office Assistant III.
<b><u>SUMMARY:</u></b>	The Grievant claims that her Office Assistant II position is misclassified and seeks to have it reallocated to Office Assistant III, a higher pay grade, which she maintains more closely matches her current duties. Because the Grievant failed to sustain her burden to prove by a preponderance of the evidence that the work she does fits the OA III classification better than the OA II classification, because controlling precedent affords "great weight" to DOP's determination, and because the evidence failed to establish that DOP's determination was clearly erroneous, the grievance is DENIED.
<b><u>KEYWORDS:</u></b>	NON-SELECTION; BURDEN OF PROOF; BURDEN OF PERSUASION; BURDEN OF PRODUCTION
<b><u>CASE STYLE:</u></b>	<u>RIGGS v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS</u> DOCKET NO. 2008-0797-DOT (6/18/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant met his burden of proof to show that his non-selection for a better position was arbitrary and capricious, discriminatory, or violated the Americans with Disabilities Act.
<b><u>SUMMARY:</u></b>	The Grievant grieved his non-selection for a Transportation Engineering Technician Senior position, alleging that he was better qualified than the successful candidate. He also claimed violations of the Civil Service statute which requires selection of candidates on a meritorious basis, and according to seniority; of the grievance statute which prohibits harassment and favoritism; and of the Americans with Disabilities Act. Grievant failed to present more than conclusions and accusations during his case in chief at the Level Three hearing. He offered no evidence supportive of his legal theories. The party with the burden of proof in a grievance may not meet that burden with mere allegations. GRIEVANCE DENIED.

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**KEYWORDS:**

PAY EQUITY; EQUAL WORK FOR EQUAL PAY; INTERNAL EQUITY; AGENCY DISCRETION; PAY PLAN IMPLEMENTATION POLICY

**CASE STYLE:**

MORGAN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND DIVISION OF PERSONNEL

DOCKET NO. 07-HHR-131 (6/5/2008)

**PRIMARY ISSUES:**

Whether a comparison of Grievant's salary to that of her co-workers showed a violation of any statute, rule, policy, or regulation.

**SUMMARY:**

Grievant argued there is no equal pay for equal work in her work unit. The West Virginia Equal Pay Act does not apply to state employees covered by the civil service system. The only requirement is that all classified employees must be compensated within their pay grade. Grievant is being paid within the pay range of the pay grade assigned by Personnel to her classification. Grievant also asserted she was making an average of 25% less than the other four Family Support Specialists in Ohio County. Grievant's experience and years of service were not comparable to those of the other Family Support Specialists in Ohio County. The salaries in Grievant's unit are not inconsistent with the Internal Equity provision of Personnel's Pay Plan Implementation Policy. Even if the salaries in Grievant's unit were inconsistent with the Internal Equity provision, this policy provides that it is within the agency's discretion to recommend a salary increase of up to 10% for employees who fit within the situation described in the policy. An agency's decision not to recommend a discretionary pay increase generally is not grievable. Grievance DENIED.

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**KEYWORDS:** SELECTION; QUALIFICATIONS; ARBITRARY AND CAPRICIOUS; DISCRETION

**CASE STYLE:** RAMSEY v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS  
DOCKET NO. 07-DOH-226 (6/25/2008)

**PRIMARY ISSUES:** Should Grievant have been selected for a Transportation Worker 3 position over the successful applicant?

**SUMMARY:** Grievant contests his non-selection for a Transportation Worker 3 position. The successful applicant had not previously been employed by DOH, but was selected because of his 22 years of experience operating a variety of heavy equipment. By comparison, Grievant had only operated DOH equipment during his tenure with them for approximately seven years. The selection decision was based upon pertinent factors and was not arbitrary and capricious, and an administrative law judge cannot substitute her judgment for that of the agency in selection matters. Grievance DENIED.

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**KEYWORDS:** TERMINATION; AT-WILL; SUBSTANTIAL PUBLIC POLICY

**CASE STYLE:** ARMSTRONG v. DIVISION OF CULTURE AND HISTORY  
DOCKET NO. 2008-0761-DEA (6/17/2008)

**PRIMARY ISSUES:** Had Grievant asserted that the termination of his at-will employment violated a substantial public policy interest?

**SUMMARY:** Grievant, an at-will employee as Director of Archives and History, was terminated without a stated reason. He alleged that his termination was related to three specific incidents during which he voiced his disagreement with and objection to decisions made by his superiors, which he believed violated certain laws, rules or regulations. However, none of the issues Grievant described implicated substantial public policy interests, as described and defined by the West Virginia Supreme Court of Appeals. Therefore, this grievance stated a claim upon which relief could not be granted and must be DISMISSED.

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<b><u>KEYWORDS:</u></b>	TRANSFER; ARBITRARY; CAPRICIOUS; DISCRIMINATION
<b><u>CASE STYLE:</u></b>	<u>BEASLEY v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/PINECREST HOSPITAL</u> DOCKET NO. 07-HHR-376 (6/30/2008)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant's transfer was done in an arbitrary and capricious manner by Respondent.
<b><u>SUMMARY:</u></b>	Grievant was transferred from the Program Services Department because she could no longer perform an essential duty of that unit (the driving or riding in a van used for the transportation of hospital residents). Respondent accommodated Grievant's request to not drive the hospital van, and a management decision was made to move Grievant to another department because she could no longer perform an essential function of her job. Grievant suffered no change in classification and no loss in pay. Grievant did not demonstrate that her transfer to another department was a violation of any law, policy, rule or regulation. Respondent's actions were more than justified, and Respondent did not act in an arbitrary and capricious manner in transferring Grievant. Grievant has not met her burden of proof by a preponderance of the evidence. Grievance DENIED.

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**KEYWORDS:** WRITTEN REPRIMAND; DISCIPLINARY TRANSFER; INSUBORDINATION; GROSS INSUBORDINATION; CRITICISM OF SUPERVISOR; OPPOSITION TO SUPERVISOR; UNCLEAR UNWRITTEN DIRECTIVES; MITIGATION; MEETING; ROAD REPAIR

**CASE STYLE:** LILLY v. DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS  
DOCKET NO. 07-DOH-387 (6/30/2008)

**PRIMARY ISSUES:** Whether Respondent proved the charges against Grievant, and whether Grievant could be removed from his position as Raleigh County Highway Administrator for being non-supportive of the District Manager.

**SUMMARY:** Grievant received the first written reprimand addressed in this grievance, for insubordination, when he did not call the Assistant District Engineer to discuss the repair of Route 40 and get specific verbal approval, before using 505 tons of hot mix asphalt to repair this road, using DOH personnel, rather than contracting the work out. Respondent did not demonstrate Grievant knew he needed to call the Assistant District Engineer before this work was done in house.

Grievant received the second written reprimand and was removed as the Raleigh County Highway Administrator for his role in organizing a meeting of other supervisors to discuss problems in District 10, specifically problems with the District Manager. Respondent did not demonstrate a violation of any directive that supervisors were not to meet without approval, or misuse of a state vehicle. Grievant did exhibit disruptive behavior for which a written reprimand was appropriate to make him aware of the behavior, and that he should correct it. Grievant could not be removed as Raleigh County Administrator simply because he was openly non-supportive of the District Manager, attempting to organize other supervisors to complain to the Commissioner about him, when he was otherwise competently performing his job duties. GRANTED IN PART, AND DENIED IN PART.